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No. 83-356

In the Supreme Court of the United States

OCTOBER TERM, 1983

JOSEPH J. REY, SR., PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

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TABLE OF AUTHORITIES

Page

Constitution and statutes:

U.S. Const. Amend. V (Due Process Clause) 3, 4

18 U.S.C. 4205(b)(2) 1

21 U.S.C. 846 1

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Petitioner contends that his conviction should be set aside because he was entrapped.

1. A jury in the United States District Court for the Western District of Texas convicted petitioner of conspiracy to possess heroin with intent to distribute it, in violation of 21 U.S.C. 846. Petitioner was sentenced to a maximum of four years imprisonment, with parole possible at any time in the discretion of the Parole Commission (see 18 U.S.C. 4205(b)(2)), and fined $5,000 (Tr. 974).

The evidence showed that petitioner, an attorney, was contacted by Alonzo Uranga, a former client, who asked for help with an immigration problem. During their conversation, petitioner asked whether Uranga "could get ahold of any drugs" (Pet. App. A2). Uranga reported this conversation to the Drug Enforcement Administration and agreed

to cooperate with the DEA. At the DEA's direction, Uranga had several conversations and meetings with petitioner. *Id.* at A2-A3.

In one recorded meeting, petitioner asked Uranga about the drugs. Uranga replied that he had available two kilograms, 65% pure, that would cost $45,000 each. Petitioner then said that because he was unfamiliar with drug transactions, he would ask an employee, Edmundo Lozano, who was more familiar with narcotics because he had been convicted of possessing heroin, to participate in the transactions. The next day, while petitioner watched from nearby, Lozano, Uranga, and a DEA agent posing as Uranga's supplier met to discuss the transaction. At this meeting, the "supplier" refused Lozano's request for a sample. Lozano reported these events to petitioner. Pet. App. A3-A4; Tr. 163-171, 240-243.

Petitioner subsequently spoke with Uranga and, in a recorded conversation, said that he had had the money ready while he watched the meeting and had been prepared to complete the purchase if Lozano had reported that the sample was of good quality (Tr. 330-337). Lozano later told petitioner that he had received a sample of high quality heroin from the supplier, and petitioner told Lozano to continue negotiations with Uranga (Tr. 185-186). Uranga subsequently contacted petitioner and told him that he had only a much smaller quantity of heroin available; but petitioner told Lozano to proceed with the transaction anyway in order to gain Uranga's confidence for future dealings (Tr. 188-189, 396-406). Lozano ultimately purchased heroin from Uranga (Tr. 150-152, 189-194, 425-433, 478-479).

2. Petitioner contends (Pet. 10-16) that this Court should review the court of appeals' decision in order to resolve a conflict among the circuits on the question whether a defendant may raise both an entrapment defense and some

inconsistent defense, such as a claim that he did not commit the acts charged. In this case, the court of appeals remarked that "[i]t is the law of this circuit that one may not claim he was entrapped into a criminal act without first admitting that he did in fact commit it"; for this reason, the court of appeals said, the entrapment defense was "not available to" petitioner (Pet. App. A5).

But even if petitioner is correct in saying that other circuits have adopted a different view, he is not entitled to relief, because he does not identify any way in which he was prejudiced by the court of appeals' rule. Despite that rule, petitioner was in fact allowed to raise his entrapment defense, and the jury was given an entrapment instruction (Tr. 923-924). That is the most petitioner could have obtained in any other circuit. The court of appeals, after noting that the defense should not have been available to petitioner, upheld the jury's rejection of it, explaining that "the evidence * * * is sufficient to support a rational conclusion that this crime had its birth in the mind of [petitioner,] not in any design implanted there by the government" (Pet. App. A5-A6).

3. Petitioner also asserts that there was no evidence of his predisposition (Pet. 19) and that the government's actions in investigating him were so outrageous that they violated the Due Process Clause and require that his conviction be set aside (Pet. 19-20). The court of appeals, while acknowledging that petitioner was "nagged" and that his "attitude appears to have been lukewarm" (Pet. App. A3), completely answered these contentions (*id.* at A6):

> To be sure, once the government learned that [petitioner] was seeking to buy drugs, it pursued offering him an opportunity to do so assiduously. Yet though he appered to blow hot and cold during that pursuit, [petitioner] — having broached the matter at the outset

> —met with the informant Uranga, procured an agent to pursue negotiations with him, expressed concern and the need for expert advice regarding price and quality of the drugs, and followed the transaction through conferences with his agent. We perceive no outrage.

Indeed, petitioner acknowledges that he engaged in all of these actions; he appears to assert only that he lacked the necessary intent. See Pet. 9[1] ("The evidence in the case was largely undisputed. Petitioner did contend lack of criminal intent * * * but he did not dispute the remainder of his involvement."). Apparently petitioner's contention at trial was that he was only gathering evidence to turn over to law enforcement authorities. See Pet. 7-8. The jury was given an instruction reflecting this defense. Tr. 924-925. But petitioner mentioned an intention to gather evidence and notify the authorities only once, to Lozano at the beginning of his negotiations, and at no other time throughout his dealings (Tr. 162-163). Petitioner never told the authorities about his extended course of negotiations even though, as a lawyer, he presumably knew how to do so. Indeed, there was testimony at the trial that petitioner had known a DEA agent for several years before the events in issue here and had had several contacts with him but never told him about the transaction (Tr. 673-675). In these circumstances, there is no reason for this Court to review the court of appeals' carefully considered determination that there was sufficient evidence of predisposition and that petitioner's conviction did not violate the Due Process Clause.

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[1]In the copy of the petition served on the government, this page is misnumbered "15."

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

REX E. LEE
Solicitor General

NOVEMBER 1983

DOJ-1983-11